81-1929

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MULTI-STATE COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, RKO GENERAL, INC., COMMUNITY BROADCASTING OF BOSTON, INC., NEW ENGLAND TELEVISION CORPORATION, THE DUDLEY STATION CORPORATION, AND FIDELITY TELEVISION, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED*

1. Whether the decision below, which approved the termination of a broadcasting license in Boston, previously held by RKO, Inc., on the basis of lack of candor by RKO in the Boston proceeding, improperly remanded for further consideration two other disqualification orders as to RKO in license renewal proceedings in New York and Los Angeles, where the Federal Communications Commission had set all three cases for determination of the character qualifications in a consolidated proceeding in the Boston case and decided all three on the same basis.

2. Whether the court below, on sufficiency of evidence grounds, in conflict with its prior holdings in other cases, improperly invalidated one of the F.C.C.'s independent bases for disqualifying RKO as a licensee, i.e., that RKO had filed false financial reports with the Commission over a period of years.

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* Petitioner Multi-State Broadcasting, Inc., is a New York Corporation. It has no parents, subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A)[1] has not yet been reported. The decision and orders of the Federal Communications Commission are reported as *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980); *RKO General, Inc. (KHJ-TV)*, 78 F.C.C.2d 355 (1980);

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[1] References to "App." refer to appendices to this Petition.

and *RKO General, Inc. (WOR-TV)*, 78 F.C.C.2d 357 (1980) (App. B).

JURISDICTION

The Judgment of the Court of Appeals was entered on December 4, 1981. (App. C). Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on January 18, 1982. (App. D). The jurisdiction of this Court is invoked under 47 U.S.C. 402(j) and 28 U.S.C. 1254(i).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 47:

§ 154. *Federal Communications Commission*

. . . .

(j) *Conduct of proceedings; hearings*

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . .

Commission's Rules

Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65 (1979), provides:

> Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be

appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

STATEMENT OF THE CASE

RKO General, Inc. (hereinafter RKO), is and has been for many years the licensee of television stations in New York (WOR-TV), Los Angeles (KHJ-TV), and Boston (WNAC-TV), among others.

In 1965 RKO applied for renewal of its Los Angeles license and was opposed by a competing applicant, Fidelity Television, Inc. Similar competing applications were filed when RKO sought renewal of its Boston and New York licenses in 1969 and 1972 respectively.

The competing application in New York was filed by Multi-State Communications, Inc. The Order (46 F.C.C. 2d 246 (1974)) of the Commission designating both applications for hearing included the anti-competitive practices and lack of candor issues. These issues were to be tried in the ongoing Boston (WNAC-TV) proceeding

and the Commission's Order stated that the resolution of the disqualification issues in the Boston hearing would be *res judicata* as to RKO.

Fidelity (RKO's Los Angeles challenger) was made a party to the Commission's hearing in the Boston case, with its participation limited to matters pertaining to RKO's anti-competitive practices and a related lack of candor issue. In 1974 the Commission, in its designation order as to the New York City station license, specified the same disqualification issues then pending against RKO in the Boston proceeding and stated that resolution of these issues in the Boston proceeding would be *res judicata* as to RKO in the New York proceeding. 46 F.C.C.2d 246, 249 (1974).

Thus, renewals of licenses in New York and Los Angeles were conditioned upon the outcome of the Boston proceeding on the so-called "character" issues. While the Commission thereafter was considering exceptions to the initial decision of an Administrative Law Judge, RKO's parent corporation, General Tire and Rubber Company, found itself being investigated by the Securities and Exchange Commission for questionable domestic and foreign payments and falsification of corporate financial records. Community Broadcasting of Boston, Inc. (Community), sought leave to reopen the F.C.C. record for a hearing on "illegal and improper conduct" by General Tire and deliberate concealment of these matters by General Tire and RKO. (J.A. 535[2] in the court below).

In reply pleadings to Community's motion to reopen, RKO, after substantial consultation with persons having

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[2] "J.A." references are to the Joint Appendix in the Court of Appeals.

"knowledge of the pertinent facts" (App. 196a), asserted on January 21, 1976, that the charges were unsupported and that "there [was] no factual or legal foundation for [Community's] pyramid of charges." Yet, two days later, the Board of Directors of General Tire was led to appoint a special committee to conduct an in-house investigation of the charges, since preliminary investigations revealed evidence of payments from an unrecorded cash fund that may have constituted "improper or illegal payments to foreign government employees." (J.A. 689). In addition, questions were raised as to political contributions in the United States by executive level employees of the Company. (*Ibid.*).

The foregoing Board action was disclosed by General Tire in a form 10-K filed with the S.E.C. in February, 1976. In the same month, the S.E.C. issued a formal order of investigation into misconduct by General Tire.

Yet, neither of these events was brought to the attention of the F.C.C. by RKO. But Community Broadcasting obtained copies of the 10-K and filed it with the F.C.C., contending that now the F.C.C. "must now seriously question the lack of good faith and candor of RKO in the material it has previously submitted" to the Commission. (J.A. 683-684).

In May, 1976, the S.E.C. filed a complaint in the district court against General Tire and its president, charging numerous illegal actions, including the same type of misconduct alleged by Community in its December petition to the F.C.C. A consent decree against the defendants was entered on the same day, and pursuant to that, a Special Review Committee was appointed by General Tire's board of directors to prepare a special report on General Tire's misconduct. (App. 70a-72a).

That Committee's "Special Report" was released on July 1, 1977, and filed with the F.C.C. on July 19, 1977. It documented extensive misconduct by General Tire as to foreign bribes, falsified corporate records, and so forth, and it demonstrated that top General Tire officials had knowledge of improper payments and a scheme for concealing the source of domestic political contributions from corporate funds. (App. 196a-199a). And this complicity of General Tire officials antedated the time when RKO representatives sought an extension of time from the F.C.C. to consult with "persons who may have knowledge of the pertinent facts"—after Community's misconduct allegations. (App. 196a).

In September, 1977, Community moved the F.C.C. to deny RKO's license renewal on the basis that the revelations demonstrate that RKO was unsuitable to continue as a broadcast licensee (C.A. App. 737), and its failure to report these matters of decisional significance to the F.C.C. and to evade this responsibility was "the darkest blot on RKO's record." (J.A. 757, 760).

RKO responded that its January 1976 pleading opposing Community's bid to reopen the record contained "meritorious procedural arguments" and was made in good faith at a time when the facts had yet to be established. It disclaimed any obligation on its part "to affirm or deny that General Tire may have engaged in questionable conduct." (J.A. 786-787). And RKO explicitly urged that if the F.C.C. decided to give further consideration to Community's charges, there was "no need for an evidentiary hearing" because the facts underlying the charges were undisputed. (J.A. 804-807).

The F.C.C. in June 1979 ordered oral argument on whether the record was sufficient to permit a determi-

nation, without further evidentiary hearings, of RKO's qualifications to remain a licensee of the Boston station, and, if so, what that decision should be. The F.C.C. specifically included Community's December 1975 petition to reopen and "all the pleadings pertinent thereto" in the record relevant to the qualifications question to be addressed. (J.A. 350-51).

In July, 1979, after the oral arguments, the F.C.C. reopened the record to receive into evidence General Tire's Special Report. (App. 79a). Thereafter, the F.C.C. received from RKO a proffer of specific evidence purporting to mitigate the matters unfavorable to General Tire, together with pleadings from all parties as to findings of fact and conclusions of law. (App. 78a-80a).

On June 4, 1980, the F.C.C. adopted an opinion which denied RKO's application for renewal of its license in Boston. (Pet. App. 48a). On June 6, 1980, the F.C.C. issued three companion orders resolving (adversely to RKO) the Boston license renewal application and the two other license renewals (New York and Los Angeles) which had been conditioned upon the outcome of the Boston proceeding.

The F.C.C.'s decision was based on three independent grounds: (1) RKO's reciprocal trade practices; (2) its willful and repeated financial misrepresentations; and (3) its persistent lack of candor with the F.C.C. "in these proceedings."

The Court of Appeals rejected the first two grounds as support for the F.C.C.'s decision, but sustained the Commission on the third ground revoking the Boston license. However, analogizing RKO's lack of candor to a contempt of court, the court below ruled that this

misconduct in the Boston proceeding was not necessarily disqualifying as to the Los Angeles and New York license renewal applications. Accordingly, the Court of Appeals remanded the latter two cases to the F.C.C. for further proceedings.

This petition is directed solely to the refusal by the Court below to affirm RKO's disqualification in New York.[3]

RKO General, Inc., has filed with this Court a petition for writ of certiorari, No. 81-1545, seeking review of the Court of Appeals' determination adverse to RKO in the Boston proceeding.

Fidelity Television, Inc., is, concurrently with this petition, filng a petition for writ of certiorari seeking review of that part of the Court of Appeals' determination remanding the Los Angeles case to the F.C.C. for further proceedings.

REASONS FOR GRANTING THE WRIT

1. Because three separate matters involving license renewal applications were pending before the F.C.C., all involving the character qualifications of the incumbent licensee (RKO) to all three television stations involved, the F.C.C. set the Boston case for hearing, 46 F.C.C.2d 246, at 250, as to certain RKO character qualification

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[3] The New York proceeding had begun in 1972 when petitioner, Multi-State Communications, Inc., filed a competing application. Following hearings in the F.C.C., Multi-State was initially found financially unqualified by the Commission, but that decision was reversed by the court below in 1978. *Multi-State Communications, Inc. v. F.C.C.*, 590 F.2d 1117, *cert. den. sub nom. RKO General, Inc. v. Multi-State Communications, Inc.*, 440 U.S. 959 (1979).

issues, and ordered that the results in the Boston case on the RKO character issues would be binding on petitioner Multi-State (the competing applicant in New York) and on Fidelity (the competing applicant in Los Angeles).

Based on RKO's concealment in the Boston case of relevant facts and complete lack of candor with respect to direct charges of impropriety levelled by Community Broadcasting, the F.C.C. concluded that RKO lacks the qualification to remain the licensee of the Boston station, and, in a separate order, ruled that RKO also lacks the requisite qualifications to remain the licensee of WOR-TV in New York. A similar conclusion was made as to Los Angeles.

The court below affirmed the F.C.C.'s holding as to Boston. But it did so on the basis that the conduct of RKO in concealing and withholding relevant facts took place in the Boston proceeding. Analogizing the improper conduct of RKO to a contempt committed in the presence of the court, the Court of Appeals held that the result had to be limited to the Boston case, since that was the proceeding in which the misconduct occurred.

The court below therefore remanded the New York and Los Angeles cases for further proceedings.

Such holding of the Court of Appeals conflicts with the holding of this Court that "the formulation of procedures [by an agency] was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 525 (1978).

Here the F.C.C. had three cases for comparative hearings, all involving character qualifications of the

incumbent licensee, RKO. The F.C.C. ordered those issues to be tried in the Boston case in the course of which the lack of candor of RKO was demonstrated and on the basis of which the Commission held it to be unqualified.

The F.C.C. was plainly entitled to conserve its resources in the way it did free from unwarranted interference by a reviewing Court.

Moreover, the lack of candor of RKO in the Boston proceeding as much involved the Los Angeles and New York cases as it did the Boston case and was properly relied on by the Commission to support its disqualifying conclusion as to all three.

Under Section 1.65 of the Commission's Rules, RKO had an obligation to report in each of the three cases that its parent company was under investigation by the S.E.C., and so forth.

In addition, the action of the court below in overturning the Commission's judgment in the New York and Los Angeles proceedings is in conflict with prior decisions of that same court, as for example in *Leflore Broadcasting Co. v. F.C.C.*, 636 F.2d 454 (D.C. Cir. 1980), where the court held that the Commission has broad latitude in the choice of remedies and sanctions after such a disqualification as has occurred here. Similarly, in *Star Stations of Indiana*, 51 F.C.C.2d 95 (1975), the Commission chose the sanction of denying *all* of the licenses of a multiple licensee found to be of deficient character. This choice of sanctions was *affirmed per curiam, sub nom., Star Broadcasting, Inc. v. F.C.C.*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied*, 45 U.S. 992 (1976). Assuming *arguendo* that lack of candor on the part of RKO was not present in New York (or

Los Angeles) at the same time it occurred in Boston, under *Leflore, supra,* and *Star Stations, supra,* the Commission under its own case law and policy and previous decisions of the court below, had ample precedent for disqualification in New York (and Los Angeles) along with the disqualification in Boston. The overlooked fact that the same lack of candor was present in New York (and Los Angeles) makes disqualification in New York more compelling.

In its Opinion (p. 44), the Court below had noted:

> The judgment that RKO showed a lack of candor in the Boston proceeding is *res judicata,* of course, and is not subject to collateral attack in these subsequent proceedings. See id. at 312–18. The Commission may give that finding whatever weight it considers appropriate. *Indeed, it may well be that such a finding is inconsistent with a licensee holding a license anywhere, although that decision is for the Commission in the first instance.*

(Emphasis supplied.) Petitioner Multi-State respectfully suggests that the Commission under the authority sanctioned in *Leflore, supra,* has already made that finding and that an additional hearing in New York is not necessary. As the court below properly noted in this case (Slip Op., pp. 37–38), the F.C.C. need not designate a comparative hearing "once it has established that one of the competing applicants is basically unqualified."

The holding below remanding the New York case for further proceedings could have broad application to similar cases in the future, and should be resolved by this Court. Unless the Commission is able to consolidate issues common to several cases in a single proceeding, it will be necessary to duplicate the same or similar records in each proceeding unnecessarily and at great additional expense of time and effort.

2. A second, independent ground for the F.C.C.'s decision disqualifying RKO in the Boston case was its finding that from 1972 until 1977 RKO had consistently certified required financial reports to the Commission that were incomplete and inaccurate. This was largely established and made apparent by the Report of the Special Review Committee of the Board of Directors of the General Tire and Rubber Company, July 1, 1977, which the F.C.C. admitted into the record in the Boston proceeding.

RKO had ample opportunity to defend itself and it chose to submit the affidavit of John Fitzgerald, RKO Comptroller. Fitzgerald, in his affidavit, claims that "he had no knowledge" that the errors existed. The Facts in the Special Report (submitted by RKO) clearly compel a different conclusion. The Commission found *from the Special Report* that by 1972, and particularly subsequent to 1974, Fitzgerald had to know that when he certified RKO's Form 324 Reports to the Commission as true and correct, he was making gross misrepresentations concerning barter and trades of the various RKO stations. The Commission, in exercising its factfinding prerogative, found that Fitzgerald's affidavit completely lacked credibility.

RKO incorrectly claimed as a defense that Fitzgerald's affidavit clarifies the matter or at least casts some doubt on the facts that would require a hearing. The Court of Appeals agreed with this claim of RKO when it noted (App. 18a):

> Despite the fact that RKO had consistently denied acting with such intent or disregard the FCC brushed aside proffered RKO affidavits to that effect and drew adverse inferences without allowing RKO to defend itself in a hearing. Such a procedure was not lawful.

Petitioner Multi-State respectfully submits that the facts and conclusion as stated by the court below are not supported by the record or by case law. The Commission's Decision in paragraphs 167 through 175 (App. 175a-180a) clearly delineates the Commission's reasoning as to why it found the Fitzgerald affidavit to completely lack credibility.

The conclusion that the Commission's procedure in drawing inferences from the evidence in the record without a hearing is unlawful, is not supported by case law and flies in the face of previous decisions of the Court of Appeals.

In *Broadcast Enterprises, Inc. v. FCC,* 390 F.2d 483, 129 U.S. App. D.C. (D.C. Cir. 1968), the court below noted that contradicting allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing before the Commission.

The Court of Appeals has further noted in *Lakewood Broadcasting Service, Inc. v. F.C.C.,* 478 F.2d 919, 156 U.S. App. (D.C. Cir. 1973), that the Federal Communications Commission may clearly draw inferences from facts already known and derive legal conclusions from those facts without an evidentiary hearing. This the Commission has done in this case. The financial misrepresentations of RKO were not limited to the Boston proceeding. For its financial misrepresentations to the Commission, RKO was properly disqualified in New York as well as in Boston. The holding of the court below in this case concerning the lack of hearing and the drawing of inferences from evidence in the record conflicts with previous decisions of the same court as enunciated in *Broadcast Enterprise* and *Lakewood, supra.* The court below has substituted its judgment for that of the

Commission, and the judgment should be reviewed by this Court to insure uniformity.

CONCLUSION

The decision below, insofar as it remands for further proceedings the Commission's disqualification determination as to RKO in the New York television station application, interferes with the Commission's discretion to control its procedures, and the decision conflicts with a prior holding of this Court ensuring such discretion.

The decision also conflicts with prior holdings of the same Court of Appeals.

And for those reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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